

CHAPTER 40B TASK FORCE
FINAL MINUTES OF THE MARCH 31, 2003 MEETING

Commission Members:

Jane Wallis Gumble	Task Force Chair, Director, DHCD
Fred Habib	Facilitator, Non-Voting member, Deputy Director, DHCD
Mark Bobrowski	Municipal Consultant, Professor, New England School of Law
Senator Harriette Chandler	Senate Chair, HUD Committee
Jack Clarke	Director of Advocacy, Massachusetts Audubon Society
Howard Cohen	Board Member, Citizens Housing & Planning Association
Representative Michael Coppola	Massachusetts House of Representatives
Marc Draisen	Executive Director, Metropolitan Area Planning Council
Steve Dubuque	President, Massachusetts Non-Profit Housing Association
Representative Robert Fennell	Vice Chair, HUD Committee
Thomas Gleason	Executive Director, MassHousing
Bennet Heart	Attorney, Conservation Law Foundation
Representative Kevin Honan	House Chair, HUD Committee
Michael Jaillet	MMA Housing Subcommittee
Al Lima	Planning Director, City of Marlborough
Bill McLaughlin	President, Rental Housing Association of the GBREB
Kathleen O'Donnell	Attorney, Kopelman & Paige
Gwen Pelletier	Board Member, Massachusetts Association of CDC's
Mayor Sharon Pollard	City of Methuen
Jeff Rhuda	Homebuilders Association of Massachusetts
Representative Harriett Stanley	(Absent) Massachusetts House of Representatives
<i>Represented by Todd Prussman</i>	
Senator Bruce Tarr	HUD Committee
Senator Susan Tucker	(Absent) HUD Committee
Senator Dianne Wilkerson	Massachusetts Senate
Clark Ziegler	Executive Director, Massachusetts Housing Partnership

Attendees (as documented on the sign-in sheet):

Judith Alland	MAPC
Arthur Bergeron	
Chris Blanchard	New England School of Law
Virginia Bullock	Brookline
Stephen Burrington	Office of Commonwealth Development
Mike Cabral	New England School of Law
Ted Carman	Concord Square Development Company
Joy Conway	GBREB
Marilyn Contreas	DHCD
Matthew Feher	MMA
Ben Ferrio	Lynch & Fierro, LLP
Ann Marie Gaertner	DHCD
Kurt Gaertner	EOEA
Jim Juliano	New England School of Law
Jonathon Little	Office of the Minority Leader, Hsg. Analyst
Toni Machowsky	New England School of Law
Don Martin	DHCD
Jim McGlynn	Office Representative Honan

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Attendees Continued

Chris Norris	CHAPA
Kristen Olsen	DHCD
Todd Prussman	Office of Representative Stanley
Kevin Quinlan	New England School of Law
Bill Reyelt	DHCD
Bob Ruzzo	MassHousing
Kevin Sanginario	Office of Senator Chandler
Matt Scafidi	New England School of Law
Kathy Sferra	Consultant, Stow
Richard Sutton	Applied Geographics, Inc.
Lynne D. Sweet	LDS Consulting Group, LLC
J. Talerman	Kopelman and Page

Materials Distributed:

- In Demand: The Massachusetts Housing Stock
- 2001-2002 Chapter 40B Regulatory Changes; Presented by Anne Marie Gaertner
- Estimating the School Impacts of Housing Development; Presented by Anne Marie Gaertner
- Submitted Comments/Materials
 - Letter from the Town of Marion
 - Letter from the Town of North Andover
 - Letter from the Towns of Mansfield and Norton
 - Letter from the Town of Seekonk
 - Letter from the Town of Brewster
 - Letter from the Town of Boxborough
 - Letter from Francis A. Puopolo
 - Housing Facts & Findings: Top Ten State and Local Strategies to Increase Affordable Housing Supply by Arthur C. Nelson. *FannieMae Foundation; Vol.5 No.1 2003*
 - Massachusetts Land Use Laws- Time for a Change by Joel Russell, Esquire. *Land Use Law & Zoning Digest; January 2002*
 - Fiscal Impact of New Housing Development in Massachusetts CHAPA

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Introductory Remarks & Adoption of March 18, 2003 Minutes:

Fred Habib, Task Force Facilitator, brought the meeting to order shortly after 2:00 PM. He noted that the Final Minutes of the March 6, 2003 meeting, Draft Minutes of the March 18, 2003 meeting, and the agenda for today's meeting had been distributed via email. He reminded the group that any Task Force member or member of the public could ask DHCD to distribute information to the Task Force, and noted that copies of materials submitted thus far were available on the table in the back of the room. He added that DHCD was scanning these documents and would be posting them on the 40B Task Force website.

Mr. Habib then announced that per the request of a number of legislators, the overview of the Bills proposing changes to 40B would be postponed until the April 14, 2003 meeting.

Jack Clarke, Director of Advocacy for the Massachusetts Audubon Society, noted that the Task Force was halfway through its meeting schedule and suggested that it would be helpful to provide information to people to review on their own time. He also suggested that the Task Force start identifying areas where they could get consensus on recommendations with the goal of reforming 40B while fending off its repeal.

Mr. Habib asked the Task Force to direct its attention to the Draft Minutes of the March 18, 2003 meeting. He pointed out the page on themes at the back of the document, which lists the issues identified by the Task Force by topic. He noted that this list would be used as the basis for further discussion of problems and solutions. He then asked if anyone would like to recommend changes.

There were no changes proposed to the Draft March 18, 2003 Minutes and all 22 Task Force Members present voted in favor to adopt them.

Procedural Issues

Mr. Habib then asked Task Force Members how they wanted to vote on recommendations. He noted that one option would be to come to consensus by voting, and that the final report could have some minority opinions but suggested keeping the minority opinions to a minimum. He then asked the group for other suggestions.

Senator Harriette Chandler noted that she was concerned about taking votes because a close vote wouldn't be productive. She added that she agreed with Mr. Clarke and would like to see the Task Force working by consensus on the report to Governor Romney.

Representative Michael Coppola suggested that the Task Force not formalize anything until the end of the process. He added that if the group does work on the issues 'piecemeal', it should be with the understanding that they could be revisited at the end.

Steve Dubuque, President of the Massachusetts Non-Profit Housing Association, suggested that it would be reasonable to use the same approach that is used to pass local zoning at town meeting, which requires a 2/3 majority vote.

Marc Draisen, Executive Director, Metropolitan Area Planning Council, suggested that the Task Force avoid limiting its proposals to only those that have no opposition.

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Presentation of New Data:

Mr. Habib asked Task Force members to direct their attention to the packet containing three color graphs and a spreadsheet. He noted that as reflected in the minutes from the first two meetings, DHCD has a list of information that has been requested by Task Force members. He added that this packet, based on information from the 1990 and 2000 Census of Population and Housing, is one of those requested items. He pointed out that the first three columns of the spreadsheet show a comparison of household growth, population growth and housing unit growth, and that the next four columns compare the vacancy rates of 1990 and 2000. He noted that household growth exceeded housing unit growth during the 1990s put significant pressure on the housing stock and that the drop in vacancy rates added to this pressure. He also pointed out that the last two columns on the spreadsheet show the percentage of owner-occupied units in the overall housing stock in 1990 and 2000. He added that the increase in the percentage of owner-occupied units shows that Massachusetts is building fewer rental units than ownership units. He then pointed out that the three color charts graphically illustrate the information from the spreadsheet that he had just reviewed.

Mr. Habib added that two more charts would be provided at the next meeting. These charts would show a snapshot of the zoning, subsidized housing inventory, and the number of units needed to achieve .75% progress for a number of communities per the request of Representative Harriet Stanley. Mr. Habib reported that Representative Harriet Stanley would present information on the counting issue at the next meeting.

Mr. Habib then noted that Anne Marie Gaertner, Senior Policy Advisor for DHCD, would make a presentation in response to the request for information on school age children.

Ms. Gaertner noted that one of the biggest questions facing communities in reviewing new development proposals is the impact on local schools. She added that there were the two key issues to consider when determining this impact: 1) How to estimate the number of new students? 2). How to estimate the cost?

Ms. Gaertner observed that the number of number of bedrooms, whether the units are single family or multi-family, and whether they are rental or ownership impact the number of new students generated in new housing development. She then reviewed estimates of the number of new students generated in new housing from three sources; 1) a UMASS study, 2) DHCD and 3) Avalon Bay.

Senator Chandler asked if the Avalon Bay data was typical.

Bill McLaughlin, President, Rental Housing Association of the GBREB responded noting that the Avalon Bay data was based on 1,382 units in a number of 40B developments in suburban areas, and those developments that were market rate or in urban areas had been filtered out.

Mr. Draisen asked why the numbers differed from source to source.

Ms. Gaertner responded that the three sources provided different estimates of the number of students per unit because they were based on different sets of data. She added that the estimates in the UMASS study were based on the 1990 Public Use Microdata Series which

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was derived from responses to the U.S. Census long form, and that the estimates in DHCD's analysis which was based on the 1987 American Housing Survey

Mr. Draisen then asked if this data was for all housing units (i.e. not just new development).

Ms. Gaertner responded that the estimates based on Census data were based on only the housing units that had been built in the five years prior to the Census; so for the UMASS study the housing units were built between 1985 and 1990.

Mr. Rhuda asked if the number of students reflected all students and not just those students attending public school.

Ms. Gaertner responded that the data reflected all school age children. She noted that people should also consider that 40B developments often have local preferences, so there is a potential that they would not generate many net new students. She added that in the Avalon Bay survey 26% of students were from within town where the development was located. She added that another point to consider is that the ratio of students attending public versus private school is about 90% to 10%. Ms. Gaertner then noted that there are a number of tools available to assess the impact of housing development. These tools include; DHCD's Growth impact handbook, the Executive Office of Environmental Affairs (EOEA) Fiscal Impact Tool (FIT), the Census, and the UMASS Report.

Ms. Gaertner then noted that there are two methods for estimating housing cost; the average cost method (average cost per student x number students) and the marginal cost method (considers current capacity thresholds). She added that over time the results of the two methods converge, but in the short term the marginal cost method can be more accurate.

Ms. Gaertner also noted that the economic and social benefits of more people in a community should be considered, as these additional people would be spending money at local businesses and impacting the local/regional economy.

Mr. McLaughlin noted that his company has looked at this question of new school age children for years because it is always the first question asked when they propose new development. He listed five factors (in order of importance) affecting the number of new students a particular housing development would generate:

1. Apartment Size (floor plan size and bedroom size)
2. Affordability (affordable homes tend to have 2.5 times as many students as market rate homes)
3. Desirability of the school system
4. Desirability of the design for families (townhouses are more conducive for family living than high-rise towers)
5. Aging in place communities (residents w/kids in affordable homes tend to stay in place, which means the numbers stabilize after about five years as the child stays in system)

Mr. Draisen expressed concern that just because a town a resident moves into a newly created unit, it doesn't eliminate the impact on the school system because the family that moves into their original unit may also bring school age children from out of town.

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Howard Cohen, Board member of CHAPA, responded to Mr. Draisen noting that kids need to go somewhere, and they need to be educated somewhere. He added that even if someone from out of town does move in, he would guess that most of moves are within the county. He then questioned why it mattered that it cost money to educate kids, because these are our own kids and they need to be educated somewhere. He suggested that perhaps the school aid formula should to be re-evaluated.

Mr. Draisen responded that the cost of educating kids was relevant because communities can't keep up with the costs, not because they don't want them.

Representative Michael Coppola noted that communities are looking for relief from the cost impact of new kids, and that if the Task Force does not discuss the issue it will be discussed in the legislature.

Arthur Bergeron noted that he worked on the Fiscal Impact Tool at EOEa, and the reimbursement rates varied tremendously amongst communities.

Senator Harriette Chandler requested documentation of the varying reimbursement rates by community as well as the cost per new student.

Senator Bruce Tarr agreed that the Task Force couldn't ignore the issue of reimbursement rates and costs per kid. He added that he had observed that the communities with numerous comprehensive permit applications have higher property values and lesser reimbursement rates.

Matthew Feher of the Massachusetts Municipal Association (MMA), noted that the MMA has the information on reimbursement rates that Senator Chandler had requested. He added that new development also impacts fire services, police services, trash etc.

Senator Chandler asked Mr. Feher if MMA has data on those impacts as well.

Mr. Feher volunteered to provide data on reimbursement rates and the economic impact on local services at the next Task Force meeting.

Mr. Rhuda noted that a study of the cost to community services of new development in the towns of Franklin and North Andover was used to generate cost projections for rest of state. He suggested that DHCD look at the actual data now to evaluate the accuracy of those projections.

J. Talerma noted that sewer and water is a major impact at local level, and is usually a community's first or second concern.

Mr. Habib noted that it was time to move to the next topic on the agenda.

Overview/Context of 2001-2002 Regulatory Changes

Ms. Gaertner noted that the question she had been asked to answer was "Why did DHCD make some changes and not others?" She first provided an explanation of the rationale for

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the regulations that were implemented, and then provided an explanation of the rationale for not implementing other proposed changes. Below is a summary.

Implemented Changes:

- Developers and subsidizing agents are required to share more information with stakeholders, and provide opportunity for feedback.
 - *Information sharing early in the development process facilitates a fair and open negotiating process whereby the needs of the developer and the community can be met*
- ZBAs must provide notice to DHCD when a comprehensive permit becomes final
 - *Allows DHCD to monitor comprehensive permit activity and increase effectiveness in its role as a regulator*
- DHCD must update the SHI every 2 years
 - *Publishing the SHI regularly allows access to information which can inform local development decisions.*
- Units are counted on the SHI when a comprehensive permit becomes final
 - *Units are credited to a community at an earlier stage in the development process, allowing the community to demonstrate progress earlier.*
- Accessory apartments and community housing developed with Community Preservation Act funds may be included on the SHI.
 - *The SHI should fairly reflect a community's housing stock which meets the needs of its low- and moderate-income households over the long term.*
- Locally subsidized units which qualify for the Local Initiative Program are included on the SHI.
 - *The SHI should fairly reflect a community's housing stock which meets the needs of its low- and moderate-income households over the long term.*
- Group home (DMR/DMH) units are included on the SHI.
 - *Group homes typically serve low- and moderate income disabled individuals and should be counted toward a community's affordable housing goals.*
- A ZBA may deny comprehensive permits for 1 year if the community has made "recent progress" toward housing goals.
 - *Allows a community to adjust to changing infrastructure needs which attend housing growth.*
- A ZBA may deny a comprehensive permit if the proposal is too "large scale" for the community.
 - *Housing development should reflect the needs, scale, and character of the community.*
- A ZBA may deny a comprehensive permit if a proposal to develop the same land within the past year did not include affordable housing.
 - *Chapter 40B should not be used as a "threat" by a developer to achieve non-affordable housing development goals.*
- The HAC may receive evidence of a community's plan and its implementation in its proceedings.
 - *If a community is engaged in planning and implementing its plan for affordable housing, its plan should not be thwarted by a proposal which is inconsistent with the plan.*
- Communities can create and implement affordable housing plans over the long term, and can deny comprehensive permits if they so choose.

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- *Communities should be able to determine how and where they should grow to meet the needs of their residents.*
- NEF developments will be approved and monitored by a DHCD authorized Project Administrator.
 - *It was essential that the valuable resource of the NEF be preserved, but also to ensure that NEF projects adhere to traditional standards of affordable housing programs in the Commonwealth.*

Not Implemented:

- Count 100% of ownership units as well as 100% of rental units on SHI
 - *The current advantage of counting all market-rate rental units provides an incentive to produce rental housing, which is extremely limited and difficult to permit throughout the Commonwealth.*
- Count Section 8 vouchers on the SHI
 - *Section 8 vouchers are income subsidies that are applied toward rent, and as such, are not housing units. In addition, vouchers obtained in Massachusetts are not required to be used in Massachusetts, and can be used to rent an apartment anywhere in the United States.*
- Limit the number of Comprehensive Permit proposals a ZBA must review over a given time period
 - *While it may be appropriate to impose such a limitation in the future, DHCD has not yet done so pending implementation (and review of results) of already extensive new regulations impacting comprehensive permits.*

Ms. Gaertner's power point presentation is available on the 40B Task Force Website.

Mr. Habib pointed out that it was important to note that many of the changes Ms. Gaertner had just reviewed originated from the legislature.

Mr. McLaughlin asked if the impact of these regulatory changes was known, and was specifically interested in the number of site approval letters issued since the NEF regulations were implemented.

Mr. Habib asked Kristen Olsen, policy analyst for DHCD, if she could report on the change in the number site approval letters issued.

Ms. Olsen responded that she didn't know the numbers right then, but would be able to provide them at next meeting.

Tom Gleason, Executive Director of MassHousing, observed that at MassHousing there had been a drop in site approval letters for rental projects, but that site approval letters for homeownership projects remained strong (though the unit numbers were smaller).

Attorney Kathleen O'Donnell of Kopelman and Paige, noted that she understood that counting all rental units in eligible developments towards the Subsidized Housing Inventory would seem like an incentive to communities, but noted that the Task Force should also consider that communities provide subsidies via density to ownership developments as well as rental.

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Attorney Bennet Heart asked for a description of MassHousing's role in NEF deals going forward.

Mr. Gleason responded to Mr. Heart, noting that MassHousing has three key functions as a project administrator: 1) Issue the project eligibility letter, 2) Provide Construction oversight 3) Ensure that income eligible households get into the affordable units now and over time. He added that in some cases MassHousing would allow banks to take more control of the oversight after they had done one or two projects. He also noted that the communities would only need to deal with MassHousing, and that this should be a relatively seamless process.

Mr. Cohen noted that the site approval letter concept was not in the statute. He explained that when the HAC started reviewing cases in the 1970s, the idea of site approval letter came about because they needed some way of determining whether the project was appropriate/eligible. He noted that this worked well while MassHousing was issuing the site approval letters, but that with the introduction of the NEF a few years ago entities were issuing site approval letters that were not concerned about the public interest and didn't really know what they were doing. He added that the hundreds of banks that were members of the FHLB had no guidelines for density caps, nor did they conduct any architectural reviews. He added that a lot of the problems seen in recent years should be solved now that MassHousing is in charge of the project eligibility letters (bringing back state-level oversight).

Mr. Habib suggested moving to the next topic on the agenda.

Identification and Prioritization of Problems

Mr. Bobrowski noted that one problem is that when a town receives a project eligibility letter from MassHousing they don't have the resources to respond to it since the technical assistance from the Massachusetts Housing Partnership not available until the application was filed with town. He suggested that towns be provided with some means to respond at this stage in the process. He also identified the confusion about whether the base number in the subsidized housing inventory could be updated in between the decennial censuses as a problem for communities. He suggested that DHCD clarify this issue. He also asked DHCD to clarify whether accessory apartments created prior to July 2002 could be counted in the subsidized housing inventory. Mr. Bobrowski also observed that the cooling off period was resulting in the opposite of what it was intended to do. He explained that developers were skipping the regular permitting process and going straight to 40B since they would have to wait 12 months if denied a non-comprehensive permit request.

Ms. Gaertner noted that DHCD changed the accessory unit regulation so that it had to be building code compliant, and that any unit (including accessory units) could go through LIP to be counted in the subsidized housing inventory.

Mr. Dubuque asked if there was standard for what qualifies as affordable under 40B and whether accessory apartments need to meet that standard.

Mr. Habib responded that a unit must have a deed restriction and it must be affordable to households earning no more than 80% median area income.

Ms. Gaertner noted the need for the accessory unit to be compliant with local bylaws.

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J. Talerman suggested that the one year window to issue building permit after comprehensive permit (for the units to be counted in the subsidized housing inventory) be adjusted to the same time period that the comp permit is valid, which is 3 years. He also suggested that for the planned production regulations, DHCD determine a flat number for communities rather than .75% of their housing stock, because .75% is not possible in larger communities. He also noted that towns have the capability to fulfill the planning component of this regulation, but not the implementation of it. He added that while the counting policy for rental/ownership is an incentive for communities, developers control whether a project will be rental or ownership. He added that the NEF issue is a front-end issue, because towns have been short-changed at the beginning of the process. He also noted his concern that MassHousing did not have the capacity to meet the demand for project eligibility letters under the new guidelines.

Mr. Habib noted that the theme that there is room for improvement at the ‘front- end’ of the process is included in the list of problems from last week.

Mr. Bobrowski noted that he had been working with a community that wants to use CPA money to place deed restrictions on existing rental units, but that it was not clear from DHCD how those units would be counted. He asked DHCD to clarify this.

Mr. Dubuque noted that there are legitimate efforts on the part of the communities to create affordable housing, but that he would be suspicious that some towns may just be trying to get units counted.

Attorney Kathleen O’Donnell noted that the language in the Community Preservation Act (CPA) is problematic because it doesn’t allow communities to set aside a pot of money to purchase units when they become available. Rather, the CPA requires that the money be designated for specific project at town meeting. She added that this makes it nearly impossible for communities take advantage of opportunities in a timely manner, as town meetings may not coincide with market opportunities.

Mr. Draisen agreed with Attorney Kathleen O’Donnell that communities need to be able to respond to market forces and noted that the purpose of the CPA was initially for the purchasing of specific parcels of land for open space. He added that the language of the CPA was not completely adjusted when housing development came into play. He suggested allowing communities to pool their CPA money to develop affordable housing.

Mr. Habib noted that anything that would provide tools for cities and towns was appropriate.

Attorney Kathleen O’Donnell suggested providing a ‘boost’ to a town’s subsidized housing inventory percentage if the town contributed its own money to the project.

Arthur Bergeron asked if the requirement for the length of affordability could be set to perpetuity. He noted that it wouldn’t impact the feasibility of a project.

Mr. Habib asked how much of an issue the length of affordability was at the town level.

Attorney Kathleen O’Donnell responded that the length of affordability was a big issue.

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Mr. Bobrowski noted the Ardmore decision ruled that absent any specific mention in the comprehensive permit units must be affordable for the period of non-compliance with zoning, and that with that decision the length of affordability was no longer a big issue.

Attorney Kathleen O'Donnell noted that the one exception is when an affordable unit is foreclosed, which results in the unit going market rate. She added that it isn't right that communities go through the struggle of getting the unit built and counted and then lose it due to foreclosure, which is out of their control. She added that it was not clear what role the community has in right to first refusal, and that communities have limited resources for finding eligible households for the affordable units.

Mr. Gleason noted that at MassHousing if a rental project is foreclosed, the units are kept affordable because MassHousing has control of entire development. He also noted that with ownership units, lenders other than MassHousing are not capable of assuming deed restrictions and that we couldn't afford to lose the resources offered via those banks.

Mr. Cohen noted that one option would be to simply continue counting the units if they are foreclosed and lose affordability restrictions, as this would be much easier than changing the entire private market.

Michael Jaillet of the Massachusetts Municipal Association noted the need to make sure that banks know that they would be at risk in the case of foreclosure because any profit should go to the town. He added that he thought that towns should be able to negotiate the length of affordability in most cases to perpetuity, but that in some cases a shorter term would be appropriate.

Mr. Cohen noted the need to address the concerns of abutters and about the impact on municipal services.

Representative Michael Coppola noted that the Task Force has seen a lot of great information but that it doesn't get to the heart of the problem, which is school impact and classroom sizes. He added that it is not easy to build new schools or to add new teachers, especially under Proposition 2 ½. He noted the need to provide relief to communities like the town of Norton, which has multiple 40B projects in the pipeline and has been growing anyway. He added that the problem has been exacerbated with the recent reductions in revenue from state. He also noted that when people move into a neighborhood they rely on the underlying zoning to know what changes to expect in the future. He added that when 40B comes into neighborhoods people's reactions are based on the value of their homes and their quality of life, not on NIMBY attitudes. He noted that the real problems are not the 20 unit proposals or single-family homes, but the proposals for large developments and for parcels that are not normally buildable.

He also noted that there are very good reasons for the state and locally imposed water resource regulations - the protection of water resources. He added that those who know about water resources know that water needs to be able to get back into the ground, and that doesn't happen with dense building. He noted that one of the reasons it is so difficult to build in Massachusetts is that our regulations consider environmental impacts.

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Mr. Habib asked Representative Michael Coppola if it was accurate to assume that wants more state support for towns accepting affordable housing projects.

Representative Michael Coppola responded that a reimbursement system would certainly be an option, but that it would depend on the numbers.

Mr. Habib asked Representative Coppola what he would suggest since he had made a point about zoning and the expectations of residents and 40B is intended to override zoning.

Representative Michael Coppola responded that he thought communities need more of a say in what goes on, that they need a stronger voice.

Mr. Habib asked Representative Michael Coppola what type of checks and balances he would suggest for environmental issues.

Representative Michael Coppola responded that we say that state regulations apply to 40B developments, but that is not the case when a project goes to the HAC because they do not pay attention to those issues.

Senator Harriette Chandler asked Representative Michael Coppola what he would say to a town that has satisfied the affordable housing required under 40B, but still says they have no place for their poor people to live.

Representative Michael Coppola responded that 40B should be changed.

Senator Harriet Chandler clarified that her concern was that housing created under 40B is not really affordable, and that there is no place for people who are in the lower middle-class and lower to live.

Representative Michael Coppola responded that there is no incentive for developers to build low-income housing, and that it is really up to the state.

Senator Dianne Wilkerson noted that she had expected to hear about specific examples of problem 40B projects, and that she keeps hearing about the problems but has not been provided with any examples. She asked what the response should be to the argument that people have certain expectations of the future of their towns, and that those expectations are violated by 40B. She added that the real issue is poor people, and though people don't want to say it- the real issue is that people don't want to live near poor people. She observed that the Task Force is not talking about 40B as a city problem, and that she was very concerned that the discussion seems have been focused on how to get around affordable housing.

Mayor Sharon Pollard, noted that it is important to understand that when the state makes a determination that communities must do something as a matter of good public policy, often when times are tough the towns are left standing alone. She added that towns don't have money to pay for police and fire to keep their current residents safe, and asked how are they supposed to pay for the services to keep the additional people in a 500 unit development safe and to educate those additional students.

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Senator Dianne Wilkerson observed that if there was more local control, she didn't think that the affordable housing that we have would have been built at all. She noted that local aid was generous when the state had the resources.

Mayor Sharon Pollard noted that it isn't possible to provide good local services when the funding varies from year to year. She also noted that she believed that project size limits are great, though she would like to scatter the units throughout town or have them use less land. She added that the problems of the communities are real, and they need to be considered along with the need for housing. She also noted the need to think about traffic.

Mr. Dubuque noted that he had never before heard that abutters expect that their community would not change at all. He then asked if it is right for somebody who moved into a unit in a subdivision that was built 10 years ago to now say 'alright that's enough'.

Representative Michael Coppola noted that abutters expect change that is consistent with underlying zoning.

Mr. Dubuque observed that people do have unreasonable expectations when they move into communities, and that they expect to be able to determine who can move in down the street.

Mr. Rhuda noted that he agreed with Senator Harriette Chandler, in that the more we restrict our housing supply, the more people we are going to push into poverty. He then asked how many communities have qualified under the planned production regulations

Jane Wallis Gumble, Task Force Chair and Director of DHCD, responded that the regulations are too new and that it is too soon to evaluate their success.

Mr. Rhuda then asked how much CPA money was devoted to housing and open space.

Jack Clarke, Director of Advocacy for Massachusetts Audubon Society responded that in 2002, \$3.6 million was for historic preservation, \$14.9 million was for open space, and \$9.7 million was for affordable housing. He added that in 2003, \$1.3 million was for historic preservation, \$1.7 million was for open space, and \$11.2 million was for affordable housing. Mr. Clarke also noted that he would like to go on site visits and talk to communities about their 40B projects.

Al Lima, Planning Director for the City of Marlborough, expressed 'unease' about what the issues are. In referencing Representative Coppola's examples of Norton and Mansfield he said he would like to know 'what went wrong'.

Mr. Habib explained that he has been encouraging people from communities with controversial 40B proposals to put their concerns in writing and submit them to the Task Force. He suggested having some of those who had submitted their concerns in writing come to the next meeting and talk about their specific concerns.

Mr. Lima emphasized including the towns' ZBA chairs.

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Representative Michael Coppola noted that he has heard repeatedly that the Task Force is unbalanced and favors advocates of affordable housing, and that bringing in the communities would be great way to address that.

Mr. Gleason noted that though hearing from communities would provide a valuable learning experience he didn't think it would be feasible to spend Task Force meeting time on their presentations and suggested scheduling additional optional meetings for community presentations.

Mr. Bobrowski noted that he had read all the letters that had been submitted to the Task Force and suggested that any communities asked to present should be asked what they would suggest short of repealing 40B.

Mr. Draisen suggested that the Task Force should also hear examples of towns working with developers to create affordable housing and increase the overall supply of housing. He noted that there are some good examples and that the Task Force would benefit from hearing from them.

Mr. Dubuque noted that the Task Force would be hearing from communities, and suggested that it would also be appropriate that they hear from people seeking a place to live.

Senator Dianne Wilkerson noted that she was well aware that for many developers 40B is the only option. She added that if the Task Force does not deal with other things that prevent the development of housing, chief of which is local control and zoning, it will have failed. She added that she believes the problem is that communities have made zoning and permitting so costly there is no way other than 40B. She added that she wanted to hear about the bad 40B projects so that the Task Force can really fix 40B.

Mr. Habib announced that the Office of Commonwealth Development (OCD) had asked him to inform the Task Force that OCD will be taking up the issue of 40A and subdivision control law.

Senator Harriet Chandler noted that the joint committee was well aware that there is a 40A as well as a 40B problem.

Mr. Draisen noted that a number of great changes have been proposed for 40A, but added that he didn't think that they would induce the creation of affordable housing our multifamily housing.

Attorney Bennet Heart suggested that the Office for Commonwealth Development focus on what could be done to encourage development in certain areas, and discourage it in other areas. He added that since Mr. Habib had noted that 40B is meant to override local zoning, he would propose using 40B in more targeted areas and that the Task Force impose smart growth criteria on 40B.

Mr. Bobrowski noted that via DHCD's planned production regulations communities would be able to target 40B to specific areas and to impose smart growth criteria. He noted the need to look at adaptive reuse and infill housing in "priority locations" and questioned whether incentive-based programs would be sufficient to achieve that result.

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Mr. Rhuda noted the tensions between the state's role in zoning law and home rule .

Representative Michael Coppola observed that though Massachusetts is the only state to have 40B, it is still very low nationwide in affordable housing.

Mr. Bobrowski noted that a review of Mount Laurell II (New Jersey) would illustrate that New Jersey goes far beyond 40B.

Mr. Habib noted that DHCD would try to get the most informed people from communities with controversial 40Bs to attend the next meeting. He noted that the Task Force needs to put more problems on the table and move to solutions. He added that in order to meet the May 31st deadline, the Task Force might have to go to weekly meetings after the April 14th meeting.

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Themes from 40B Task Force Discussion 3-31-03

Note: This information is a summary of the problems that we discussed and presentations that were suggested for future meetings of the 40B Task Force. We have added to and reorganized the list by topic while highlighting requests for future presentations in **bold**. This list has evolved from the information found at the end of the minutes of March 6, 2003.

Chapter 40B process

- Concerns about the beginning of the process – Should initial letters to the ZBA contain more information, should cities and towns go through a lengthy and costly process if letter is not a commitment of funding, should towns receive assistance at time of receipt of site eligibility letter?
- Does MassHousing have the capacity to meet the demand for project eligibility letters under the new regulations.
- Proposed developments might not be responsive to towns needs
- Concern about lack of density limitations
- Should zoning in Master Plans be linked to relief from 40B
- Where do we want to foster growth – Smart Growth/regional growth patterns/Low Income Housing Tax Credits
- Many 40B developments are not being built – even when approved by HAC
- **Present and discuss Audobon Society proposal on regional housing plans and credits**
- **Present what other states have adopted to promote the development of affordable housing (e.g. RI – inclusionary zoning, Maryland, Smart Growth)**
- **Ask the HAC to present information to the group**
- **Present number of site approval letters issued over time**

Should 40B be building market units and affordable units?

- In the 1970's when there were more state subsidies, comprehensive permits were used to build 100% affordable developments. In the 1990's, lack of subsidies requires market rate units to "cross-subsidize" the affordable units.
- Concern re: concentration of poverty if all units are affordable
- Middle income housing affordability gap
- 40B not responsive to need for more housing for lower income people
- **Present LMI figures for each community**
- **Present information on who lives in (what income level) Ch.40B developments.**

Counting

- How ownership units are counted results in communities "chasing their tail" – Presentation by Rep. Stanley
- Is 10% the right number? Should it be applied regionally? Should it be higher and count more types of units?
- Clarify DHCD policy regarding adjustment of total housing units. Is it every decennial census or can the number be challenged between the decennial census?
- Do the units count on the Ch. 40B inventory if a city or town uses CPA money to buy deed restrictions on existing housing?

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- Discuss offering “Extra credit” for communities using local funds to build affordable housing
- If the comprehensive permit is valid for three years, can we count the unit on the SHI as long as a building permit is issued within three years?
- **Present # of affordable units in communities without subsidies**
- **How long will it take communities to get to 10%? (at a rate of .75% annually, in larger communities)**
- **Present # of units each city and town needs to achieve 10%**
- **Better info/clarification on accessory apartments (bylaw compliant and meeting 40B criteria)**

Maintaining Affordability of Units

- Address the problem of loss of affordability due to foreclosure
- Community capacity to monitor
- Community “Right of First Refusal”
- Pertuity vs. a shorter deed restriction

Reasons why 40B is being used

- Misuse of 40A forces developers to use 40B
- Enormous pressure not to develop
- Wetlands and other environmental regulations (Title 5) that are more restrictive than the State statute invite use of 40B (no set criteria for cities and towns before they pass local zoning and bylaw regs)
- Local zoning assists people who already have housing and does not assist people who do not yet have housing
- Local control limits regional planning
- To redress restrictive zoning and lack of planning
- It is in the developer self interest to achieve other development plans
- The local permitting process is time consuming and adds to the cost of development
- No zoned land for multi-family housing by right
- Dramatic “downsizing” as less dense uses are now allowed
- Land use planning system is dysfunctional
- Limited sites available
- Mandatory inclusionary zoning is not the law in MA
- **Present information on which communities are undertaking EO 418 Plans**
- **Present # of units built outside of the 40B process that qualifies for the 40B inventory**
- **Present resources for building housing outside of the 40B process**
- **Present increase in 40B housing compared to building permits**
- **Present building caps by community**
- **Present how many cities and towns have wetland regs. stronger than DEP**

Municipal Impacts

- Based on the information presented, will the group provide a recommendation to offset municipal impacts

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Local Capacity and Coordination

- Limited local capacity; ZBA's may be limited by:
 - knowledge of planning rules, con comm. (waiver)
 - lack of capacity/communication from other boards
 - lack of capacity to evaluate financials, local housing needs
 - threat of developer going to HAC undercuts ZBA's authority
 - myth vs. reality of 40B impacts local outcomes
 - need for consultants to do peer review
- Communities may be limited by:
 - no planners on staff
 - limited local resources
- Developers:
 - have trouble getting timely responses
 - struggle with the costs of lengthy process that has no assured end date

Recently Established Regulations

- The rationale for the establishment of all the recently established regulations has been presented. The task force should decide whether to include the recently established regulations in any proposed legislation.

Three issues have surfaced regarding the recently established regulations:

- Existing NEF applications are not impacted by new NEF regulations
- Unintended consequences of the "cooling off period" regulation- developers initially seek 40B approval rather than submit subdivision plans
- Planned production – Discuss using a flat number based on local circumstances, not a percentage

CPA

- Change the CPA to allow for cities and towns to set aside a pot of money to purchase units when they become available
- Discuss allowing for the pooling of CPA funds to be used for affordable housing